Washington Law Review

Volume 34 | Number 1

3-1-1959

Sales—A Comparison of the Law in Washington and the Uniform Commercial Code

Ralph W. Johnson
University of Washington School of Law

SALES—A COMPARISON OF THE LAW IN WASHINGTON AND THE UNIFORM COMMERCIAL CODE

RALPH W. JOHNSON*

The Uniform Commercial Code has now been adopted in Pennsylvania, Massachusetts, and Kentucky. In 1959 it probably will be introduced into the legislature of the State of Washington and into the legislatures of at least fourteen other states.[1]

In Washington the desirability of remedial legislation in the commercial law field is self-evident to those who have worked in the field. The Uniform Commercial Code purports to remedy most, if not all, of the ills that exist in this field, both in Washington and in other jurisdictions. Is it the proper remedy for this state? Only a comprehensive study and analysis of the Code itself can answer this question. There are, however, other criteria that are at least relevant to such a determination. For example, it is pertinent to observe that the Code was drafted by some of the outstanding judges, lawyers, and scholars in the field of commercial law[2] and that their efforts extended over a period of seven years, from 1945 to 1952, when the first publication of the Code was made.[3] It is further pertinent to observe that nearly all of the very abundant comment that has been made about the Code since its first publication has been highly favorable; this is particularly true of the comment by lawyers and businessmen in Pennsylvania, where the Code has been law since 1953.[4]

The purpose of this article is to analyze and comment upon the

* Associate Professor of Law, University of Washington.

[1] As reported by William A. Schnader in Bus. Law, Jul. 1958, p. 646, the Code will be introduced into the legislatures in the following states in 1959: Connecticut, Maine, New Hampshire, Vermont, Ohio, Indiana, Illinois, Michigan, North Dakota, Colorado, Nevada, New Mexico, Wyoming, and Georgia.

[2] For a complete list of those who worked either as draftsmen or advisors on the Code, see the Comment to the first section of the Code entitled "Title." A few of the names reported there are: Karl N. Llewellyn of the University of Chicago law school; Walter D. Malcolm, Esq., of Boston; Wm. A. Schnader, Esq., of Philadelphia; Harrison Tweed, Esq., of New York City; Joe C. Barrett, Esq., of Jonesboro, Arkansas; Dean Albert J. Harno of the University of Illinois law school; United States Circuit Judge Sterry Waterman of St. Johnsbury, Vermont; Professors Robert Braucher and A. E. Sutherland, of the law school of Harvard University; Judge John T. Loughran of the New York Court of Appeals; Professor William E. Britton, of the University of Illinois law school; Professor Arthur L. Corbin, of Yale University law school; Dean William L. Prosser, of the University of California school of law; Judge James Alger Fee, of Portland, Oregon; Judge Augustus N. Hand, of New York, N. Y., and Judge Learned Hand, of New York, N. Y.

[3] The planning for the Code began in 1940. The entire project was under way by 1945.

[4] *The New Movement Toward Uniformity in Commercial Law—The Uniform Commercial Code Marches On,* Bus. Law., Jul. 1958.

changes that the Code would make on the sales law of Washington. Article 2 of the Code would entirely replace the existing Uniform Sales Act[5] in Washington and some of the Washington case law.

It will be recalled that the Uniform Sales Act was first promulgated by the National Conference of Commissioners on Uniform State Laws in 1906 and was enacted in Washington in 1925. To date it has been enacted in thirty-five states, the District of Columbia, and Hawaii. This act was based on the English Sales of Goods Act, which was enacted in England in 1893. The English act was a codification of the then existing English common law. Both reason and analysis[6] support the proposition that the tremendous growth and change that have taken place in the commercial world in the past fifty years have in many respects caused the Sales Act to become badly outdated.

The over-all approach of the Code to the problem of revision and modernization of the Sales Act is stated in the Comment to Code Section 2-101 which says:

> The coverage of the present Article is much more extensive than that of the old Sales Act and extends to the various bodies of case law which have been developed outside of and under the latter.
>
> The arrangement of the present Article is in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.

In order properly to consider the specific provisions of article 2 of the Code, the reader should have some familiarity with certain general provisions of the Code contained in article 1. For example, section 1-102 of article 1 contains a statement of purpose, and rules of construction;[7] section 1-205 provides for the territorial application of the

[5] RCW 63.04.

[6] For example, see Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?* 59 Yale L. J. 821 (1950).

[7] *Section 1-102. Purposes; Rules of Construction; Variation by Agreement.*

(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

act, and the parties' power to choose applicable law; and sections 1-201 and 1-205 set out definitions for many of the terms used in the Code.[8]

Sections 2-101 to 2-725 of article 2 will now be set out and commented upon seriatim.

Section 2-101 provides for a short title. Article 2 "shall be known and may be cited as Uniform Commercial Code—Sales."

Section 2-102. Scope; Certain Security and Other Transactions Excluded From This Article

Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

This section is substantially the same as the corresponding provision of the Sales Act.[1]

"Goods" is defined in Code section 2-105. The first sentence of the above section (2-102), regarding the applicability of the article to transactions in goods, was added in 1956 (to the 1952 draft) "to eliminate any ambiguity as to the application of article 2 to contracts not related to the sale of goods";[2] thus the article would not relate to the sale of realty or services.

Whether a transaction is a sale or security arrangement is not always obvious. At times the parties may cause the instrument to appear as a sale, when in reality it is intended as a security device. The rule in this state, as in others, is that the real intent of the parties is controlling, even though such intent appears to be contrary to the form of the instrument. If the parties intended the transaction to be a security

(3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

(4) The presence in certain provisions of this Act of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).

(5) In this Act unless the context otherwise requires

(a) words in the singular number include the plural, and in the plural include the singular;

(b) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

[8] References to these definitions will be made wherever pertinent in this article.

[1] RCW 63.04.750.

[2] 1956 Recommendations of the Editorial Board for the Uniform Commercial Code.

device, then it will be so construed,[3] and neither RCW 63.04.750 of the Sales Act nor the above section of the Code would then apply to it.[4]

The comment to the above section says that article 2 regulates the "general sales aspects" of security transactions. Thus it would appear that even though the parties intended the transaction to be for security purposes, nevertheless some portions of the sales article might apply, at least insofar as consistent with the true intention of the parties to have the instrument perform a security function.

Section 2-103. Definitions and Index of Definitions.

(1) In this Article unless the context otherwise requires
  (a) "Buyer" means a person who buys or contracts to buy goods.
  (b) "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.
  (c) "Receipt" of goods means taking physical possession of them.
  (d) "Seller" means a person who sells or contracts to sell goods.
(2) Other definitions applying to this Article or to specified Parts thereof, and the sections in which they appear are [omitted].

The definitions of "buyer" and "seller" under the Uniform Sales Act, RCW 63.04.010, were the same as above, except that in addition they included "any legal successor in interest of such person." The Code omits this phrase, thus returning to the definition used in section 62 of the English Sales of Goods Act. The reason for the omission is that section 2-210, which limits some types of delegation of performance on assignment of a sales contract, makes it clear that not every such successor can be safely included in the definition, although ordinarily such successors are included.

Neither the Code nor the Sales Act definitions of buyer include a mortgagee. However, in *Fisher v. Thumlert*,[1] decided after the adoption of the Washington Sales Act, the supreme court held that the term "buyer" as used in the Sales Act did include a "mortgagee"; thus a good faith mortgagee for value acquired a valid mortgage to certain goods, even though the mortgagor had a voidable title when he executed the mortgage. To the extent that this decision is based on the definition of "buyer" in the Sales Act, it seems clearly wrong. It would also be wrong under the Code definition.

In many jurisdictions, including Washington, the terms "buyer"

[3] Hole v. Unit Petroleum Corp., 15 Wn.2d 416, 131 P.2d 150 (1942) (truck); Beadle v. Barta, 13 Wn.2d 67, 123 P.2d 761 (1942) (realty); Plaza Farmers Union, etc. Co. v. Tomlinson, 176 Wash. 28 P.2d 299 (1934) (realty).

[4] Such an instrument would come within the provisions of article 9 of the Code.

[1] 194 Wash. 70, 75, 76 P.2d 1018 (1938).

and "seller" may be found in the center of a swirl of decisions dealing with warranties and privity.[2] These decisions arise from situations of which the following is typical. *A* sells goods to *B*. Under the Sales Act certain implied warranties go with the sale. *B* then sells the same goods to *C*. Because of a "breach" of *A*'s warranties, *C* is injured. *C* now wishes to recover damages from *A* for his injuries. The defense usually raised is that the warranties on which *C* would like to base his claim run only between the "seller" and the "buyer." As to *C*, is *A* a "seller"; and as to *A*, is *C* a "buyer"? If not, then some, if not all, the barrels of *C*'s gun have been spiked. These questions are of great importance in the warranty area, and are substantially unresolved in this state, as elsewhere. The Code provides only a partial answer to them.[3] The major areas of doubt are in such conflict in, and between, the various jurisdictions that the Code drafters deemed it advisable not to attempt the codification of any sweeping general rule. The matter was thus left to the developing case law.[4]

"Good faith" was given only one definition in the Sales Act; i.e., "A thing is done in good faith . . . when it is in fact done honestly, whether it be done negligently or not."[5] No separate definition was made for transactions by merchants. The Code definition of "good faith" for transactions by non-merchants is virtually the same as that of the Sales Act. However when the "good faith" of a merchant is to be determined, a different test is used; i.e., "honesty in fact *and the observance of reasonable commercial standards of fair dealing in the trade.*" The phrase "fair dealing in the trade" was added in 1956 "to eliminate the possibility that the definition might be read as imposing on merchants a general standard of care."[6]

Section 2-104. Definitions: "Merchants"; "Between Merchants"; "Financing Agency."

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

---

[2] See discussion in the comment following Code sections 2-313, 2-314, 2-315, and 2-318.

[3] See section 2-318.

[4] See comment No. 3 to section 2-318.

[5] RCW 63.04.010 (2).

[6] 1956 Recommendations of the Editorial Board for the Uniform Commercial Code. Discussion following section 2-103.

(2) "Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (Section 2-707).

(3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

The Sales Act does not have any comparable section. However, even though the definition of "merchant" and "between merchants" is new, the basic idea is one that does appear at several places in the Sales Act. RCW 63.04.160 (2) and 63.04.170 (c) of the Sales Act provide for warranties of merchantability where goods are bought from "a seller who deals in goods" of that kind or description; RCW 63.04.160 (5) makes provision for a warranty of fitness when "annexed by the usage of the trade"; and RCW 63.04.460 and 63.04.720 acknowledge that the parties may vary their obligations by agreement, or have them varied by trade customs. Thus under the Sales Act the nature of a party's obligation may be determined by the fact that he is in fact a "merchant" and is thus presumed to be cognizant of, and subject to, the prevailing trade rules and customs.[1]

Other sections of the Code impose special obligations upon merchants, which do not apply to the casual or inexperienced seller or buyer.[2] The purpose of these special rules is to give greater clarity and certainty to the rights and duties of the parties, instead of having these rights and duties depend on the circumstances of each case, as is done under some of the Sales Act sections cited above.

Some criticism has been leveled at this new classification on the ground that the novel wording may tend to breed litigation.[3] One critic argues that it will be difficult to determine whether a particular buyer

[1] See: Williamson v. Irwin, 44 Wn.2d 373, 267 P.2d 702 (1954); Codd v. Crowley Co., 162 Wash. 650, 299 Pac. 366 (1931).

[2] U.C.C. Sections 2-201 (2), 2-205, 2-207, and 2-209, dealing with the statute of frauds, firm offers, confirmatory memoranda, and modification. Section 2-314 on the warranty of merchantability. Section 2-103 (1) (b), concerning "good faith"; 2-327 (1) (c), 2-603, and 2-605, dealing with responsibilities of merchant buyers to follow seller's instructions, etc.; 2-509 on risk of loss; and 2-609 on adequate assurance of performance.

[3] Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 572 (1950); Waite, *The Proposed New Uniform Sales Act*, 48 MICH. L.

or seller is or is not a "merchant." However, the same argument can be made regarding the distinction between servants and independent contractors, agents and non-agents, and persons of other like classifications. And our statutes abound with such classifications[4] which lawyers have found to be both useful and necessary. Undoubtedly some cases will arise that will cause difficulty in classification. However that does not deter from the expectation that this classification, which appears to be fully in accord with existing commercial practices, should serve a very useful purpose.

The drafters of the Code believed that transactions between professional merchants require special, and more certain, rules—rules that may not fairly be applied to the inexperienced buyer or seller. Professor Arthur L. Corbin,[5] who did extensive work on the Code and who strongly supports the use of this new classification, points out that in early times the arguments between English merchants were decided by the "law merchant," a special body of rules that grew out of the practices and customs of these merchants. As these rules became more widely known and accepted, the courts applied them to an ever-widening group, until today they establish the standards for virtually all commercial transactions, whether between professionals or not. But the professionals have continued to develop their own special rules and customs as their changing business methods have required. These are often unknown to the non-professional. It is this continually growing and changing body of commercial rules and customs that the Code endeavors to recognize and to apply to the professional only.

Section 2-105. Definitions: Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial Unit."

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

(2) Goods must be both existing and identified before any interest

REV. 603, 617 (1950). For an article in support of this new classification, see: *Merchant Provisions in The New Uniform Commercial Code—Sales,* 39 GEO. L.J. 130 (1950).

[4] See, for example, the definitions of: Common Carriers, RCW 81.04.010; Commission Merchant and Credit Buyer, RCW 20.04.050; Householder, RCW 84.04.050; Retail Merchant, RCW 20.04.100; Underwriter, RCW 21.04.010 (6); Holder in Due Course, RCW 62.01.052.

[5] Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?* 59 YALE L.J. 821 (1950).

in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

(3) There may be a sale of a part interest in existing identified goods.

(4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

(5) "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

(6) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

The Uniform Sales Act defines "goods" as "all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."[1] Goods to be manufactured or acquired by the seller after making the contract to sell are "future goods."[2] Few Washington cases have dealt with these definitions.[3] The Code departs from this wording of the Sales Act and makes the definition of goods depend, with two exceptions, on the movability of the object. The two exceptions are (1) unborn young of animals, and (2) growing crops and other identified things attached to realty, as described in Section 2-107. Both of these are expressly defined as "goods" and are thus brought within the ambit of the sales article of the Code.

Can anything that is defined as "goods" be made the subject of a

[1] RCW 63.04.010.

[2] RCW 63.04.010.

[3] The only cases found that refer to the Sales Act definitions of "goods" and "future goods" are: Crystal Recreation, Inc. v. Seattle Ass'n of Credit Men, 34 Wn.2d 553, 209 P.2d 358 (1949) (Held, that a contract for the manufacture and installation by the seller of certain restaurant fixtures, which were specially made and thus could not be re-sold elsewhere, was a contract for work, labor, and materials, and not a contract to sell "future goods." Therefore the Sales Act did not apply, and the question of when title passed was resolved by the common law of contracts); Baum v. Murray, 23 Wn.2d 890, 162 P.2d 801 (1945) (Held, that food sold for immediate human consumption was "goods" and that the sale was thus within the Sales Act.)

present sale? The Code says yes, but only if the item is both existing and identified. If it does not meet both of these requirements it is "future" goods, and a purported present sale thereof operates only as a contract to sell (much the same as under the Sales Act).[4]

Can unborn animals, or growing crops, be the subject of a present sale under the Code? Prior to the Sales Act such a sale was often possible on the theory that the animal or crop was "potentially possessed."[5] However, the doctrine of "potential possession" was so difficult to apply and so varied in interpretation in the various jurisdictions that the Sales Act abolished it.[6]

The Code once again makes possible a present sale of growing crops. This might have been done by providing that such crops are both "existing" and "identified" under subsection (2) above. However, the drafters of the Code treated the matter differently; they simply provided, in section 2-107, that growing crops could be sold before severance.

The treatment of the unborn young of animals is not so clear. Under subsection (2) above, an interest in goods can pass only when they are both "existing" and "identified." But there is no definition of the term "existing."[7] At what point, if at all, is an unborn animal "existing"? Does it exist only after conception, at some point between then and birth, or never? The Code could resolve this point but does not.[8] A similar problem arises in connection with the term "identified,"

[4] RCW 63.04.060 (3).

[5] 1 WILLISTON, SALES, §§ 135, 136 (rev. ed. 1948).

[6] RCW 63.04.060. And see 1 WILLISTON, SALES, §§ 135, 136 (rev. ed. 1948).

[7] It might be argued that section 2-501, re identification, aids in the definition of "existing." Section 2-501 provides that "the buyer obtains a special property . . . in goods by identification of existing goods . . . [and] . . . in absence of explicit agreement identification occurs when . . . the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting. . . ." Thus one might say that, by expressly providing for identification of certain unborn young, the drafters of the Code clearly intended that such young should be considered "existing"; i.e., it would seem unlikely that goods could be "identified without being "existing." However, only one classification of the unborn is thus subject to identification. Where the contract is for the sale of unborn young to be born over twelve months after contracting, there is no provision that the young are identified.

[8] If unborn young are deemed to be non-existing under the Code, then under 2-105 (2) a purported sale thereof would operate only as a contract to sell; no present interest would pass. This could be significant in connection with at least one other section of the Code. Section 2-403 (1), re "good faith" purchases, provides: "A purchaser of goods acquires all title which his transferor had or had power to transfer. . . . A person with a voidable title has power to transfer a good title to a good faith purchaser for value." A purchaser is defined in section 1-201 as one who acquires an "interest in property" by the transaction. If an unborn animal is non-existing, then there could be no *purchaser* and thus no "good faith purchaser for value."

In order to obviate any question concerning the interpretation of this section, it is recommended that an additional sentence be added to subsection 1 of section 2-105 as follows: "Unborn animals, after conception, are deemed to be 'existing' for the purposes of this Act."

which is only partly defined in section 2-501. That section provides that in absence of explicit agreement identification occurs when the unborn young are "conceived if the contract is for the sale of unborn young to be born within 12 months after contracting." Prior to conception, unborn young clearly are not identified or identifiable. But what if the contract is for the sale of unborn young to be born within fifteen months, or some other period longer than twelve months? In such a case they are not, by section 2-501 (1), identified.

Another important aspect of the question of whether "title" or an "interest" in goods does nor does not pass at a given time is the matter of risk of loss. Under the Sales Act risk of loss was, with two minor exceptions, made to follow the property in the goods unless the parties otherwise agreed. Section 2-509 of the Code reveals that this rule would be changed. Risk of loss is in no way dependent upon the property in the goods. Therefore one need not consider this problem in determining whether there has or has not been a present sale.

The Sales Act definition of goods includes "things attached to or forming a part of the land which are agreed to be severed before sale or under the contract of sale."[9] Clearly this would seem to include standing timber. The California courts have so held;[10] Oregon is contra.[11] The Washington Supreme Court has never decided the matter of the applicability of the Sales Act to standing timber, although it has had several opportunities to do so.[12] The Code definitely excludes standing timber from the definition of "goods," except where the seller is to sever (which would be unusual). A full discussion of the Code provision regarding standing timber may be found in the portion of this article dealing with section 2-107.

Although the Sales Act expressly excludes "money" from the definition of "goods,"[13] nevertheless the better reasoned argument is that money is "goods" under that Act if it is being treated as a "commodity," as distinguished from a medium of exchange.[14] Section 2-105 of the Code continues this "better reasoning" by its express wording.

---

[9] RCW 63.04.010 (1).

[10] Palmer v. Wahler, 133 Cal. App. 2d 705, 285 P.2d 8 (1955); Ascherman v. McKee, 143 Cal. App. 2d 277, 299 P.2d 367 (1956); Crag Lumber Co. v. Crofoot, 144 Cal. App. 2d 755, 301 P.2d 952 (1956); Kirsch v. Barnes, 157 F. Supp. 671 (1957).

[11] Seguin v. Maloney-Chambers, 198 Ore. 272, 253 P.2d 252 (1953) *petition for rehearing denied*, 256 P.2d 514.

[12] Coleman v. Layman, 41 Wn.2d 753, 252 P.2d 244 (1953); Elmonte Inv. Co. v. Schafer Bros. Logging Co., 192 Wash. 1, 72 P.2d 311 (1937); State Fin. Co. v. Hamacher, 171 Wash. 15, 17 P.2d 610 (1932).

[13] RCW 63.04.010 (1).

[14] 1 WILLISTON, SALES, § 66b (rev. ed. 1948).

Section 2-106. Definitions: "Contract"; "Agreement"; "Contract for Sale"; "Sale"; "Present Sale"; "Conforming" to Contract; "Termination"; "Cancellation".

(1) In this Article unless the context otherwise required "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (Section 2-401). A "present sale" means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.

(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

The term "contract *for* sale" is not defined in the Sales Act. Under the Code it includes both a present sale of goods and a contract *to* sell goods at a future time. The Comment to this section says this term is "used as a general concept . . . but the rights of the parties do not vary according to whether the transaction is a present sale or a contract to sell unless the Article expressly so provides."

The definition of the term "conforming" in subsection (2) is new; however, it continues the policy of the Sales Act[1] of requiring exact performance by the seller of his obligations as a condition to his right to require acceptance.[2]

Section 2-107. Goods to Be Severed From Realty: Recording.

(1) A contract for the sale of timber, minerals or the like or a structure or its materials to be removed from realty is a contract for the sale of goods within this Article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effctive only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without

[1] RCW 63.04.120, and .170.
[2] Comment number 2 to Code section 2-106.

material harm thereto but not described in subsection (1) is a contract for the sale of goods within this Article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

Subsection (1) will, if followed by the court, make a substantial change in the law concerning transfers of interests in standing timber in the State of Washington. However, in view of the confused state of the existing law,[1] and of the apparently workable provisions of the Code, there is much to recommend its adoption.

The Sales Act provides that "goods" includes "things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."[2] Clearly this appears to include standing timber. Professor Samuel Williston, probably the leading authority on the interpretation of the Sales Act, states in his three-volume work on sales that this was the intent of the Act.[3] He further suggests, however, that the term probably should be limited to standing timber that is to be removed "immediately," in view of thet fact that: (1) the definition of "goods" was copied directly from the English Sales of Goods Act, (2) the English Act was a codification of the then-existing common law of England, and (3) the common law of England, as reflected in the case of *Marshall v. Green,* held that only standing timber that was to be severed immediately from the soil was personal property.[4]

Although the Sales Act was enacted in Washington in 1925,[5] and although there have been at least four cases decided by Washington's supreme court since that time involving sales of standing timber,[6] there is nevertheless no mention of this Act in any of those cases. This fact,

[1] See Johnson, *Washington Timber Deeds and Contracts,* 32 WASH. L. REV. 30 (1957).

[2] RCW 63.04.010 (1).

[3] 1 WILLISTON, SALES § 62 (rev. ed. 1948).

[4] 1 WILLISTON, SALES §62 (rev. ed. 1948); cf. 6 CORNELL L.Q. 426 (1921).

[5] Wash. Laws 1925, Ex. Sess., c. 142.

[6] Three state cases and one federal case have been decided since the enactment of the Uniform Sales Act in this state in which the court should have given consideration to the application of the Sales Act. Milwaukee Land Co. v. Poe, 31 F.2d 733 (9th Cir. 1929); State Fin. Co. v. Hamacher, 171 Wash. 15, 17 P.2d 610 (1932); Elmonte Inv. Co. v. Schafer Bros. Logging Co., 192 Wash. 1, 72 P.2d 311 (1937), Coleman v. Layman, 41 Wn.2d 753, 252 P.2d 244 (1953). (However, the Milwaukee case involved a transaction that took place in 1921-24, prior to the effective date of the Sales Act.)

although seemingly unique, has been the pattern throughout the states[7] that have adopted the Sales Act. Only two states have been found whose courts have openly grappled with the question of the applicability of the Sales Act to sales of standing timber; they are California and Oregon. The California courts have held that the Act applies to such sales.[8] The Oregon Supreme Court held initially that the Sales Act applied to sales of standing timber, but only to those transactions in which the buyer was obligated to remove the timber.[9] More recently the Oregon court held that the Act did not apply to any sales of standing timber.[10] The Minnesota Supreme Court recently gave passing notice to the Sales Act while discussing a case involving a sale of standing timber, but stuck to its prior (pre-Sales Act) decisions holding that a sale of standing timber is a sale of an interest in realty and is governed by the rules relating to such transactions.[11]

The most complete statement of Washington law regarding sales of standing timber is set out in the case of *Elmonte Inv. Co. v. Schafer Bros. Logging Co.*[12] In that case, decided in 1937, the court said:

> Standing trees are real estate unless they have been sold with the intention of an immediate severance from the soil.[13]
>
> We are committed to the rule that a conveyance of standing timber, with the right of entry upon the land and removal of the timber therefrom in the future, whether the time of removal be measured by stated or reasonable time, is the conveyance of an interest in real property.[14]

Unfortunately, this "rule," which is still the law of the state,[15] raises many more questions than it resolves; e.g., how long is "immediately"? On a large tract of land can "immediately" be a number of years? What happens when the period of time included in "immediately" is

---

[7] All of the states have adopted the Sales Act except Florida, Georgia, Kansas, Louisiana, Mississippi, Missouri, Montana, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, Virginia, and West Virginia.

[8] Palmer v. Wahler, 133 Cal. App. 2d 705, 285 P.2d 8, 12 (1955). The California court did not cite cases from Oregon or any other jurisdiction in arriving at this conclusion. Reliance was placed solely on the language of CAL. CIV. CODE §§ 658 and 660. These sections contain language identical to section 76 of the Uniform Sales Act. The rule announced in Palmer v. Wahler was approved in Ascherman v. McKee, 143 Cal. App. 2d 277, 299 P.2d 367 (1956); Crag Lumber Co. v. Crofoot, 144 Cal. App. 2d 755, 301 P.2d 952 (1956), and Kirsch v. Barnes, 157 F. Supp. 671 (1957).

[9] Reid v. Kier, 175 Ore. 192, 152 P.2d 417 (1944).

[10] Seguin v. Maloney-Chambers, 198 Ore. 272, 253 P.2d 252 (1953), *petition for rehearing denied*, 256 P.2d 514.

[11] Steller v. Thomas, 232 Minn. 275, 45 N.W.2d 537 (1950).

[12] 192 Wash. 1, 72 P.2d 311 (1937).

[13] *Id.* at 21, 72 P.2d 311, 320.

[14] *Id.* at 22, 72 P.2d at 320.

[15] The most recent affirmation of the Elmonte rule was in Coleman v. Layman, 41 Wn.2d 753, 252 P.2d 244 (1953).

over? What if the "stated" time is such a short time that the buyer must act "immediately" to meet the stated deadline? What rules govern the recording of timber-sale instruments and the rights of third parties? These questions remain substantially unresolved in this state.[16]

How would the Code affect the Washington law? Conceivably it might affect it very little, as for example, if the court avoids consideration of it as was done with the Sales Act. If this is done, then the law will remain as stated in the *Elmonte* case. If, however, the court is to be guided by the Code then these results would seem to follow: (1) Where standing timber is to be severed by someone other than the seller, it is not goods; it thus remains realty. A conveyance or contract regarding such timber, to be effective, would have to be in the form required for conveyances or contracts concerning realty. Also realty recording statutes would have to be complied with. (2) Where the contract for the sale of standing timber provides for severance by the seller, a purported present sale which is not effective as a transfer of an interest in land is effective only as a contract to sell goods at a future time. (3) Where the contract is in form sufficient to be effective as a transfer of an interest in land, it can act as a present sale. However, pursuant to subsection (3), the provisions relating to realty records still control. Because of the broad language of Washington's realty recording statute,[17] this means that the purchaser must comply therewith if he wishes that protection. Presumably a second purchaser would not need to comply with the realty recording statute because he would be only acquiring "goods," and the transaction would in no way affect any interest in realty. He would then have to comply with the recording requirements for sales of personal property.[18]

The Code provisions seem to be much simpler and more practicable than the existing Washington rules as stated in the *Elmonte* case.

Growing crops are treated specially in this section. Subsection (2) provides that they are "goods," even though attached to realty, and that the parties can by identification effect a present sale before severance. Prior to the Sales Act, such a sale, before severance, could sometimes be accomplished under the doctrine of "potential possession." [19]

---

[16] For a more complete discussion of these and other related questions, see Johnson, *Washington Timber Deeds and Contracts*, 32 WASH. L. REV. 30 (1957).

[17] RCW 65.08.060 provides that: "Conveyance includes every written instrument by which an estate or interest in real property is created, transferred, mortgaged or assigned or by which the title to any real property may be affected. . . ."

[18] RCW 65.08.040.

[19] 1 WILLISTON, SALES § 135 (rev. ed. 1948).

The Sales Act abolished that doctrine. Under that act there can be no present sale of growing crops. The Code once again permits a present sale of growing crops but without the vagaries of the rule of "potential possession."

The term "fixtures" is not used in subsection (2) because of the diverse definitions of the term. Instead, the test of "severance without material harm" is substituted. The Sales Act provides that "goods" includes "things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."[20] Thus the Sales Act definition appears to be somewhat broader than that of the Code. However, no Washington cases have been found which might have turned on this distinction.[21] The only Washington case found that might have been affected by these provisions was decided before the Sales Act.[22] It held that an oral sale of a small "temporary" house, located on a farm, was not covered by the real property Statute of Frauds and was therefore valid.[23]

The above section of the Code also provides that the parties can by identification effect a present sale before severance of certain defined things. Under the Sales Act one of the principal consequences of a present sale was the passing of title and the resulting transfer of the risk of loss. Under the Code the concept of title and property is minimized, and the risk of loss is in no way connected with it.[24] Therefore, there is considerably less significance in the fact that there can be a present sale of certain items.

---

[20] RCW 63.04.010 (1).

[21] The test of severance without material harm has been used in Washington in a case involving a mortgage of a chattel attached to realty. In Boeringa v. Perry, 96 Wash. 57, 164 Pac. 773 (1917), the court said: "But the right to preserve the personal character of fixtures by agreement is limited to chattels which are attached to the realty in such a manner that they may be detached without being destroyed or materially injured, or without destroying or materially injuring the realty to which they are attached." The Boeringa case was cited with approval on this point in King v. Title Trust Co., 111 Wash. 508, 191 Pac. 748 (1920); Hill's Garage v. Rice, 134 Wash. 101, 234 Pac. 1023 (1925), and Nelse Mortensen & Co. v. Treadwell, 217 F.2d 325 (1925). However, it should be noted that this test has been superseded in more recent cases by a new, three-headed test, as follows: (1) actual annexation to the realty or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold. For a few of the cases using this test see: Strain v. Green, 25 Wn.2d 692, 172 P.2d 216 (1946); Hall v. Dare, 142 Wash. 222, 252 Pac. 926, 50 A.L.R. 625 (1927); Gasaway v. Thomas, 56 Wash. 77, 105 Pac. 168 (1909). See also: 22 WASH. L. REV. 140 (1947), and BROWN, PERSONAL PROPERTY § 137 (2d Ed. 1955).

[22] *In re* Bloor's Estate, 115 Wash. 507, 197 Pac. 614 (1921). The Uniform Sales Act was enacted in Washington in 1925.

[23] The determination of which statute of frauds applies is one of the principal consequences of the classification of the subject matter of a sale as "goods."

[24] U.C.C. 2-509.

Section 2-201. Formal Requirements; Statute of Frauds.

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2-606).

The Statute of Frauds proposed by the Code covers fewer kinds of contracts than the Sales Act Statute of Frauds,[1] which it would replace. The Code proposal would also modify some of the holdings of the Washington Supreme Court which tended to broaden the application of the Sales Act Statute of Frauds.[2] The reasons for the changes are "to make the formal requirements more definite and more easily applied [and] to make the repudiation of genuine contracts less likely to be successful while at the same time in no way increasing the proba-

[1] RCW 63.04.050.

[2] The specific case law involved and the extent of its change is discussed in subsequent paragraphs.

bility of successful fraud."[3] Certainly the general trend in the various states has been to permit an ever-increasing array of methods for avoiding the statutes of frauds. At least one respected authority in the field has gone so far as to suggest the total elimination of the statutes of frauds on two grounds: (1) modern trial procedures are better suited to eliminating fraudulent claims than were those in use when the first statute of frauds was conceived and promulgated, and (2) the practice of making and acting upon oral contracts is today extremely widespread in the business world.[4] However, the Code does not go this far, and instead merely attempts to make the new Statute of Frauds conform more nearly to the way the courts are actually handling cases involving sales transactions.

The necessity for a writing. The Sales Act provides that certain contracts to sell and sales are unenforceable "unless some note or memorandum in writing of the contract or sale be signed by the party to be charged. . . ."[5] This does not say just what must be contained in the note or memorandum. However, the Washington Supreme Court, in *Baillergeon, Winslow & Co. v. Westenfeld*[6] said that the "note" or "memorandum" must contain "all the terms of the contract." The *Baillergeon* case was an action to recover the purchase price of corporate stock in which the Statute of Frauds was urged as a defense. The court held that the alleged agreement was within the Statute of Frauds because, inter alia, the writing did not state either the purchaser or the price. The Code would probably change this result.

---

[3] Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?* 59 YALE L. J. 821, at 829 (1950).

[4] *Id.* at 833.

[5] RCW 63.04.050 (1).

[6] 161 Wash. 275, 295 Pac. 1019 (1931). The court quoted with approval from 1 MECHEM ON SALES 360 (1901), under the heading "What Note or Memorandum is Sufficient," as follows:

> To satisfy the requirements of the statute, the note or memorandum must, in general terms contain a statement of all the essential terms of the contract, naming or describing with reasonable certainty the parties thereto; describing or furnishing reasonably certain means for identifying the property; stating the price, when agreed upon, or showing the data from which it may be ascertained; and setting forth all of the essential terms, as to time and place of payment and delivery, the terms of credit, or other incidents of the agreement. It must also be a note or memorandum of the entire contract and not simply of the major portion of it.

In the more recent case of Bharat Overseas v. Dulien Steel Prods., Inc., 51 Wn.2d 685, 321 P.2d 266 (1958), the court quoted with apparent approval from 37 C.J.S. *Statute of Frauds* § 181 (1943) as follows: "Thus the note or memorandum must disclose the subject matter of the contract . . . ; the parties thereto . . . the terms and conditions . . . ; and, in some but not all jurisdictions, the price or consideration." For cases making similar statements see: Le Marinel v. Bach, 114 Wash. 651, 196 Pac. 22 (1921); Washington Dehydrated Food Co. v. Triton Co., 151 Wash. 613, 276 Pac. 562 (1929). See also 1 WILLISTON, SALES § 102 (rev. ed. 1948).

However, it would not affect the statement in *Wright v. Seattle Grocery Co.*[7] that the omission of a designation of time and place in the writing does not bring the writing within the Statue of Frauds, because the court would (and did there) presume a reasonable time and place from the surrounding circumstances.[8] Nor would the Code change the further statement in the *Wright* case that the unexplained use of technical terms does not put the case within the Statute, because such terms are explainable by parol.[9]

The Code provides that the "writing is not insufficient because it omits or incorrectly states a term agreed upon. . . ." (although this broad statement is limited somewhat by the balance of the sentence, "but the contract is not enforceable . . . beyond the quantity of goods shown in such writing"). Paragraph 1 of the Comment then says there are only three definite and invariable requirements for the memorandum: (1) it must evidence a contract for the sale of goods; (2) it must be "signed"; and (3) it must specify a quantity. It is apparent that these requirements would be considerably less stringent than those of the prior statutory and case law discussed above.

Probably the extreme case that the Code provision would exclude from the Statute of Frauds can be illustrated as follows: A broker makes a pencilled memorandum on a loose sheet of paper: "I have recently negotiated a contract for the sale of a thousand bushels of wheat between *B* and *C*." (signed) "*A*." This note does not show the price, the time or place of delivery, which party is the buyer, for whom *A* was acting, or whether he was actually authorized. However it is probably nevertheless sufficient under the Code Statute of Frauds.[10]

The requirement that it be "signed." The Sales Act provides that the writing must "be signed by the party to be charged or his agent in that behalf."[11] The Washington court, in accord with the majority rule,[12] has construed substantially the same language (contained in a pre-Sales Act statute[13])—to mean that either a written, stamped, or

---

[7] 105 Wash. 383, 177 Pac. 818 (1919).

[8] As both parties were engaged in business in Seattle, the court determined that Seattle was the place of delivery. Also, as no time was stated, the court determined that a reasonable time was intended.

[9] *Id.* at 390. The agreement provided, "Sold to Chauncey Wright, . . . 1 Car Gold Medal Flour. . . ." The court said: "Parol evidence was admissible to explain the quantity understood by the parties to be comprised in the car-load." To the same effect see: Nut House v. Pacific Oil Mills, 102 Wash. 114, 172 Pac. 841 (1918), and Washington Dehydrated Food Co. v. Triton Co., 151 Wash. 613, 276 Pac. 562 (1929).

[10] For a discussion re this hypothetical, see 2 CORBIN ON CONTRACTS § 507 (1950).

[11] RCW 63.04.050 (1).

[12] See 2 CORBIN ON CONTRACTS § 522 (1950).

[13] Rem. Code § 5290.

printed name is sufficient.[14] The Code would not change this rule. Section 1-201 defines "signed" to include "any symbol executed or adopted by a party with present intention to authenticate a writing." Comment 39 to this section explains that the inclusion of "authentication in the definition of 'signed' is to make clear that . . . a complete signature is not necessary. Authentication may be printed, stamped or written; it may be by initials or thumbprint."

Under existing law the signature is sufficient whether at the top, bottom, middle, or side of the paper.[15] And the signature by the party to be charged alone is sufficient to bind him,[16] even though the other party has not signed the instrument. The Code does not change these rules.

Partial performance. The Sales Act Statute of Frauds can be avoided if the "buyer accepts part of the goods or choses in action so contracted to be sold or sold, and actually receives the same, or gives something in earnest to bind the contract, or in part payment. . . ."[17] If there is part performance, the contract is enforceable in full. The Code proposes to change this rule and to make the contract enforceable only for the goods which have been accepted or for which payment has been made and accepted. This change is made to eliminate the possibility that a person might make the whole contract enforceable by lying that he had paid a dollar on account or had delivered some item of nominal value.[18]

In connection with the matter of part performance, it is worth while to recall that the "contract" Statute of Frauds, RCW 19.36.010, also applies to many sales of goods. It provides in paragraph (1), "Every agreement that by its terms is not to be performed in one year from the making thereof" is void unless in writing. The Code does not affect this statute. It is, therefore, pertinent to ask: If part performance takes a contract out of the Sales Act, and Code, Statutes of Frauds, will the same part performance also take the contract out from under the above clause of RCW 19.36.010? On this matter the Washington cases are badly confused.[19] However, the most recent utterance

[14] Wright v. Seattle Grocery Co., 105 Wash. 383, 177 Pac. 818 (1919). This holding was criticized in a concurring opinion by Tolman, J., in State v. Superior Court, 147 Wash. 294, 266 Pac. 134 (1928); however, it has never been altered or reversed by any subsequent decision of the Washington Supreme Court.

[15] Tingley v. Bellingham Bay Boom Co., 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055 (1893).

[16] *In re* Tveekrem's Estate, 169 Wash. 468, 14 P.2d 3 (1932). Wright v. Seattle Grocery Co., 105 Wash. 383, 177 Pac. 818 (1919).

[17] RCW 63.04.050 (1).

[18] For a discussion of the reasons for this change, see Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?* 59 YALE L. J. 821, at 831 (1950).

[19] See Comment, *Statute of Frauds—Contracts Not To Be Performed Within a Year,* 9 WASH. L. REV. 105 (1934), where the following statement is made at page 106:

by the supreme court would seem to indicate that part performance can take such a contract out of the statute.[20] If it does not, the party attempting to enforce the contract may be confronted with a situation where he can avoid the Sales Act (or Code) Statute of Frauds by part performance, but may still be unable to enforce the contract because of RCW 19.36.010 (1).

Between merchants. There will, of course, be the problem of classification of persons as "merchants." This problem was discussed previously in this article.[21] Once the classification is made, however, the Code rule is clear enough, and it would appear to conform to the common practice in the business world of sending confirmatory letters and expecting a rather immediate response from the recipient of such a letter if he disagrees with its contents. As there is no similar rule in the Sales Act (and the courts therefore do not often speak of confirmatory letters), it is impossible to determine what effect this provision might have on the case law of this state.

Goods made to special order. On this matter the Code hardly varies from the like provision of the Sales Act.[22] The only change is that the seller must have made a substantial change of position before notice of repudiation by the buyer. However, even this change will probably not affect many transactions, because it does not apply except in the

---

Our decisions have not been uniform in regard to the effect of part performance of an oral contract which has been declared void under the statute of frauds. The Field's case [In Re Field's Estate, 33 Wash. 63, 73 Pac. 768 (1903)] recognized part performance of such a contract as being sufficient to take the case out of the statute of frauds. The Coffman case [Spokane Canal Co. v. Coffman, 61 Wash. 357, 112 Pac. 383 (1910)] indicated by way of dicta that the same result should be reached. However, since the decision of Union Savings and Trust Co. v. Krumm (88 Wash. 20, 152 Pac. 681 (1915)) our court has uniformly refused to recognize the doctrine of part performance. The more recent decisions refuse to apply the doctrine in both the cases in which the oral contract by its express terms is to be operative for more than a year and also the cases in which no such express terms appear.

Subsequent to the date of the above Comment, the Washington Supreme Court decided the following cases pertinent to this question: Hamilton, Inc., v. Atlas Freight, Inc., 184 Wash. 199, 50 P.2d 522 (1935) (Part performance did not take a contract for hauling freight out of the one-year Statute of Frauds); Folkner v. Perkins, 197 Wash. 462, 85 P.2d 1095 (1938) (Part performance took a lease modification out of one-year Statute of Frauds. No comment was made that this rule applied only to leases); Cone v. Ariss, 13 Wn.2d 650, 126 P.2d 591 (1942) (Part payment did not take a contract for sale of an automobile that could not be performed in less than twenty-six months out of the one-year Statute of Frauds); Sunset Oil Co. v. Vertner, 34 Wn.2d 268, 208 P.2d 906 (1949) (Where an assignee of a contract for the sale of petroleum products covering several years did not agree in writing to carry out the contract, he was nevertheless bound. The contract was not within the one-year Statute of Frauds, because there was part performance by the assignee by delivery of petroleum within one year from the date of the contract).

[20] Sunset Oil Co. v. Vertner, 34 Wn.2d 268, 208 P.2d 906 (1949).

[21] See discussion following Section 2-104.

[22] RCW 63.04.050 (2).

unusual case where the change of position occurs prior to receipt of notice of repudiation.

Admission in pleadings, testimony, or otherwise in court, that a contract was made. Under the Code, such an admission takes the case out of the Statute, however, only to the extent of the quantity of goods admitted. No Washington case has been found that would be affected by this Code provision. There are a number of Washington cases holding that where the defendant neglects to raise the Statute of Frauds by his pleadings, or otherwise, he has waived it as a defense.[23] The Code provision, however, goes much further than this. It provides that, even though the issue is properly raised in the pleadings, the Statute is nevertheless avoided if the party against whom the agreement is sought to be enforced admits the existence of the oral contract in his pleadings, testimony, or otherwise in court. This provision finds indirect support from the rule that a writing may be sufficient even though it is an attempt to cancel or repudiate the agreement.[24] Furthermore, the Code provision would appear to be in accord with the purpose behind the Statute of Frauds, and, in spite of the fact that some jurisdictions have held to the contrary,[25] there appears to be no valid reason for objecting to the adoption of this provision in Washington.

Code only applies to sales for $500.00 or more. The Code Statute of Frauds purports to affect only contracts for the sale of goods for the price of $500.00 or more. The Uniform Sales Act proposed a like limitation; however, when the Washington legislature adopted the Sales Act, it changed the figure $500.00 to $50.00. The various states have adopted differing legislation on this matter. The majority have adopted the figure of $50.00.[26] One obvious argument for raising the figure to something higher than $50.00 is the considerably lessened value of the dollar since 1925, the date of the adoption of the Sales Act. Certainly another, and equally persuasive, argument is that businessmen very frequently do not take the trouble to put into writing contracts involving less than $500.00. And there is also much to be said for maintaining the uniformity of the Code wherever possible.

Miscellaneous. It is well to call to mind, in any discussion concern-

[23] See, for example: *In re* Haukeli's Estate, 25 Wn.2d 328, 171 P.2d 199 (1946); Miller v. O'Brien, 17 Wn.2d 753, 237 P.2d 525 (1943); Goodrich v. Rogers, 75 Wash. 212, 134 Pac. 947 (1913); Taylor v. Howard, 70 Wash. 217, 126 Pac. 423 (1912).

[24] Grant v. Auvil, 39 Wn.2d 722, 238 P.2d 393 (1951). See also cases cited in 2 CORBIN, CONTRACTS § 511 (1950).

[25] See cases collected in Annot., 22 A.L.R. 723 (1923), and 1 WILLISTON, CONTRACTS § 71a (rev. ed. 1936).

[26] 2 CORBIN, CONTRACTS § 475 (1950).

ing the various methods of avoiding the Statute of Frauds, that the contract in question in any given case is not proved merely because the statute is avoided by a writing, part performance, or otherwise. The effect of the avoidance of the Statute, is merely to eliminate this particular defense. The party seeking to enforce the contract must still carry the burden of proving the contract to the satisfaction of the trier of fact.

Section 2-202. *Final Written Expression: Parol or Extrinsic Evidence.*

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 1—205) or by course of performance (Section (2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

There is no comparable provision in the Washington Sales Act. Although some other states[1] have a statutory parol-evidence rule, most states, including Washington, have never adopted such statutes.

It should be noted that this section does not purport to state a complete parol-evidence rule[2] or a complete replacement for it. Its purpose is to make clear that certain kinds of evidence are made admissible which have not been admissible in some courts in the United States, probably because of a misunderstanding, or misapplication of the so-called parol-evidence rule.

Subsection (a) of the above section would permit the introduction of evidence of course of dealing and usage of trade to explain or supplement the writing. "Course of dealing" is defined in Section 1-205 as a "sequence of previous conduct . . . establishing a common basis of understanding for interpreting their expressions and other conduct." A course of dealing gives particular meaning to and supplements or qualifies the terms of an agreement. However, in the event there is an

[1] See for example, Oregon: O.R.S. 41.740 (1940).

[2] The parol evidence rule may be stated thus: Parol or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict written instruments. National Indemnity Co. v. Smith-Gandy, 50 Wn.2d 124, 309 P.2d 742 (1957); Ball v. Stokely Foods, 37 Wn.2d 79, 221 P.2d 832 (1950); Nelson Equipment v. Goodman, 42 Wn.2d 284, 254 P.2d 727 (1953). Buyker v. Ertner, 33 Wn.2d 334, 205 P.2d 628 (1949). There are dozens of cases in this state which state this rule; the above four are merely illustrative.

inconsistency between the course of dealing and the exprss terms of the writing, the latter controls. "Usage of trade" is defined in the same section as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." And any usage of trade of which the parties either are or should be aware gives particular meaning to and supplements or qualifies the terms of an agreement. If there is an inconsistency between the usage of trade and the express terms of the contract, the latter controls. If there is an inconsistency between the course of dealing and the usage of trade, the course of dealing controls.

The Comment to section 2-202 says that the finding of an ambiguity in the writing is not a condition precedent to the admission of evidence of a course of dealing or usage of trade. Although at first blush this statement might seem to be an innovation to existing Washington law, a closer analysis of the Washington cases reveals that they are quite consistent with such a provision.

At the outset it should be remembered that the parol-evidence rule is not a rule of evidence, but is a rule of substantive law.[3] When the parties to a contract have set out in writing the final expression of their agreement, any evidence of prior or contemporaneous written or oral agreements that were thus superseded is immaterial and irrelevant. By definition, if the writing expresses the parties' final intention, any evidence of a different intent or agreement is not relevant to the issue of what they finally intended. However, if there is a disagreement as to the intention expressed in the writing and the court is called upon to resolve it, then in order intelligently to do so the court must place itself in the same position the parties were in at the time they signed. To do this, most courts,[4] including those in Washington,[5] will permit the introduction of evidence of the circumstances surrounding the execution of the instrument. Such surrounding cricumstances might

[3] 3 CORBIN, CONTRACTS § 573 (1950); 32 C.J.S. § 851 (1942); Jackson v. Domschot, 40 Wn.2d 30, 239 P.2d 1058 (1952); Andersonian Inv. Co. v. Wade, 108 Wash. 373, 184 Pac. 327 (1919); McGregor v. First Farmers-Merchants Bank & Trust Co., 180 Wash. 440, 40 P.2d 144 (1935).

[4] 3 CORBIN, CONTRACTS § 579 (1950); 32 C.J.S. §§ 961 (d) and 962; RESTATEMENT, CONTRACTS § 238 (1932).

[5] McKennon v. Anderson, 49 Wn.2d 55, 298 P.2d 492 (1956); Kelly v. Valley Construction Co., 43 Wn.2d 679, 262 P.2d 970 (1953); Vance v. Ingram, 16 Wn.2d 399, 133 P.2d 938 (1943); Leavenworth State Bank v. Cashmere Apple Co., 118 Wash. 356, 204 Pac.5 (1922). In the Vance case the court, citing 3 WILLISON, CONTRACTS § 629 (rev. ed. 1936), said "the court may always consider the surrounding circumstances leading up to the execution of an agreement, not to evidence an intent contrary to that expressed in the agreement, but to place the court in the same position as the parties."

reasonably include custom, usage of trade,[6] course of dealing,[7] the nature of the subject matter, the relation of the parties,[8] and any other facts known by both parties to exist when they signed the writing.[9] The Washington cases make it clear that it is not necessary that any ambiguity be found in the instrument as a condition precedent to the admission of this kind of evidence.[10] These cases also make it clear that such evidence is not admissible to vary or contradict the terms of the writing, but merely to explain them.

Of course if such evidence reveals an ambiguity which was not apparent from the writing itself, (a latent ambiguity) the court will then admit parol or extrinsic evidence to aid in resolving the ambiguity.[11] By the same token, if there is a patent ambiguity in the instrument, parol or extrinsic evidence will be admitted to explain which of the possible interpretations the parties intended.[12]

---

[6] Florence Fish Co. v. Everett Packing Co., 111 Wash. 1, 188 Pac. 792 (1920); Kane v. Order of United Commercial Travelers of America, 3 Wn.2d 355, 100 P.2d 1036 (1940); Parks v. Elmore, 59 Wash. 584, 110 Pac. 381 (1910); Adamant Plaster Mfg. Co. v. National Bank of Commerce, 5 Wash. 232, 31 Pac. 634 (1892).

[7] Parks v. Elmore, 59 Wash. 584, 110 Pac. 381 (1910).

[8] Mikusch v. Beeman, 110 Wash. 658, 188 Pac. 780 (1920).

[9] McKennon v. Anderson, 49 Wash. 2d 55, 298 Pac. 2d 492 (1956); Leavenworth State Bank v. Cashmere Apple Co., 118 Wash. 356, 204 Pac. 5 (1922).

[10] In McKennon v. Anderson, 49 Wn.2d 55, 298 P.2d 492 (1956), the writing, signed by one of the members of a partnership, used the term "we." At first blush this would seem obviously to mean only the partners; however, the court, under the rule in question, admitted evidence of the surrounding circumstances which showed that one of the partners had a tenant on certain property who might have been included in the term "we." This evidence caused the writing to become ambiguous, and thus parol evidence was properly admitted to explain the true intent of the parties. In Vance v. Ingram, 16 Wn.2d 399, 133 P.2d 938 (1943), the court was called on to determine whether a certain writing created a partnership or a debtor-creditor relationship. It held that there was no ambiguity, and thus parol evidence was not admissible. The court went on to say, however, that evidence of the surrounding circumstances was nevertheless admissible, although in this case it would not aid the appellant, because such evidence can only be used to explain, and not to vary or contradict, the terms of the writing. In Leavenworth State Bank v. Cashmere Apple Co., 118 Wash. 356, 204 Pac. 5 (1922), the court was called on to construe a contract providing that seller would provide buyer with 125,000 apple boxes. The seller's box manufacturing plant burned, and in an action for breach for failing to deliver the boxes, seller was permitted to introduce evidence that at the time the contract was entered the seller operated only one box manufacturing plant, that the buyer knew this, and that this plant had subsequently been totally destroyed by fire. In approving the admission of this evidence, the supreme court referred to the rule permitting introduction of evidence of surrounding circumstances and said that if the seller had tried to prove an oral agreement that the boxes were to be manufactured only at its Blewett mill (the one that burned), then the parol evidence rule probably would bar such evidence. However, the evidence admitted was only for the purpose of placing the court in the position of the parties when they executed the instrument, "and such class of testimony is always admissible as an aid to a construction of the contract." (at 361).

[11] McKennon v. Anderson, 49 Wn.2d 55, 298 P.2d 492 (1956); Adamant Plaster Manufacturing Co. v. National Bank of Commerce, 5 Wash. 232, 31 Pac. 634 (1892); Wetzler v. Nichols, 53 Wash. 285, 101 Pac. 867 (1909); Fagan v. Walters, 115 Wash. 454, 197 Pac. 635 (1921).

[12] Maxwell v. Maxwell, 12 Wn.2d 589, 123 P.2d 335 (1942); Fagan v. Walters, 115 Wash. 454, 197 Pac. 635 (1921); State Bank v. Phillips, 11 Wn.2d 483, 119 P.2d 664 (1942).

Subsection (a) of section 2-202 further provides for the introduction of evidence of "course of performance" to explain or supplement the writing. Section 2-208 states that "any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement." It also provides that when there is an inconsistency between "express terms" and course of performance, the former shall control. Course of performance controls over both course of dealing and usage of trade. These sections clearly continue the well-established rule of this state that permits admission of evidence of course of performance to aid the court in resolving an ambiguity in the writing.[13] However the sections go a step further; the Comment to section 2-202 says that the finding of an ambiguity in the writing is not a condition precedent to the admission of evidence of course of performance. By way of illustration, this would seem to mean that if Seller agreed to sell, and Buyer to buy, 100 "grade-1" turkeys (the parties impliedly assuming that the usage of trade establishes the grade) each month for the next eight months, and for the first three months Seller delivered to Buyer 75 "grade 1" turkeys and 25 "grade 2" turkeys, if Buyer accepted them without objection, such conduct would bind Buyer to accept similar deliveries in the future. By their course of performance, the parties have defined "grade 1" to mean something different from the meaning given to it by usage of trade.

An examination of the Washington cases reveals none that would clearly allow such evidence to be admitted nor any that have specifically denied its admission.[14] The rule generally stated in this state with regard to the admission of evidence of course of performance (or practical construction, as it is often called) is that there must be an ambiguity before such evidence will be admitted.[15] Of course the ambiguity might be established by the introduction of parol or extrinsic evidence of the circumstances surrounding the executing of the writing.[16] But no Washington case has been found in which evidence of

[13] Franklin v. Northern Life Ins. Co., 4 Wn.2d 541, 104 P.2d 310 (1940). Tucker v. Brown, 199 Wash. 320, 92 P.2d 221 (1939). Chermak v. Taggares, Inc., 166 Wash. 67, 6 P.2d 380 (1931). Tone v. Parlaman, 154 Wash. 389, 282 Pac. (1929). Fernich-Murphy Printing Co. v. Palmer, 113 Wash. 566, 194 Pac. 785 (1921); Amherst Inv. Co. v. Meacham, 69 Wash. 284, 124 Pac. 682 (1912); Nelson v. Western Steam Nav. Co., 52 Wash. 177, 100 Pac. 325 (1909). See also: N & M Lumber Co. v. Chicago, M., St. P. & P. Ry., 134 Wash. 291, 235 Pac. 794 (1925); Heaton v. Smith, 134 Wash. 450, 235 Pac. 958 (1925); Metropolitan Bldg. Co. v. Seattle, 92 Wash. 660, 159 Pac. 793 (1916); RESTATEMENT, CONTRACTS § 235 (e) (1932).

[14] For cases examined, see footnote 13.

[15] See footnote 13.

[16] Tucker v. Brown, 199 Wash. 320, 92 P.2d 221 (1939); Heaton v. Smith, 134 Wash. 450, 235 Pac. 958 (1925).

course of performance was admitted where the only ambiguity established was one revealed by the evidence of course of performance itself, although at least two cases come close to doing so.[17]

There is, however, a serious difficulty with interpreting section 2-202 (a) in the manner suggested by the above hypothetical. Section 2-208 provides that where the "express terms" of the writing are inconsistent with the evidence of course of performance, the former controls. The phrase "express term" is not defined in the Code. It is susceptible of at least two definitions that are pertinent here. One is: a clear and unambiguous term of the writing, determined as of the time it is signed. But if this definition is adopted, then the provision admitting evidence of course of performance without first establishing an ambiguity is meaningless. For example, if this reasoning applied to the hypothetical referred to above, the term "grade 1" would be an "express term" if considered as of the time of the execution of the writing, because at that time usage of trade clearly established the quality of turkeys that came within the classification "grade 1." In such a case there would be an inconsistency between the express term and the evidence of course of performance, and the "express term" would control. It was only *after* the admission and consideration of evidence of course of performance that the meaning of the grades became ambiguous.

In view of the above, if meaning is to be given to the provision of

[17] Tone v. Parlaman, 154 Wash. 389, 282 Pac. 208 (1929). In this case the writing provided that purchaser would buy all the men's clothing that he was going to buy exclusively from seller so long as seller had a certain concession described previously in the agreement. The concession previously described was one that terminated at the end of one year. The concession was renewed each year for a number of years, and during all this time buyer and seller continued to deal with each other on the same terms as the first year, thus raising the question whether the "concession" referred to in the original agreement meant only the current one, for a single year, or whether it was intended to include all renewals. The court held it included all subsequent renewals because of the parties' practical construction. In Franklin v. Northern Life Ins. Co., 4 Wash. 2d 541, 104 P.2d 310 (1940), the court was called upon to construe a group insurance contract. The contract provided that the insurance company could decline to renew at any given year if the "number of employees insured . . . is less than 50 per cent of those eligible for insurance at such anniversary." The policy had been in effect for eleven years (eleven renewals) when the company endeavored to cancel on the basis of the above escape clause. The evidence showed that during the last ten of the eleven years there were less than fifty per cent of the employees of the Seattle Post Office who were insured. However, during the same time there were considerably more than fifty per cent of the members of the Seattle Postal Benefit Association who were insured. There seems little question but that, if the contract had been construed at the time it was entered, the fifty per cent would clearly have been interpreted to refer to the employees of the Seattle Post Office, and not the members of the Association. However, because the company had continued its insurance under the agreement for ten years without raising this objection, the court held that by this course of performance they had construed the contract to refer to only the members of the Association. Thus the company was not permitted to cancel the contract.

the Code admitting evidence of course of performance without first establishing an ambiguity, it would seem that the second definition of the phrase "express term" must be used, i.e.: "a clear and unambiguous term of the writing, as of the *time of trial.*" Thus the clarity of the term would be determined in light of the evidence of course of performance itself. If, after the introduction of such evidence the "express term" is still clear, the evidence of course of performance properly would be stricken as irrelevant and immaterial.

Lastly, subsection (b) of the above Code section permits the admission of "evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the 'agreement'." This provision does not change the established Washington law. There are a number of cases in this state holding that where only a part of the contract is in writing, i.e., it is only partly integrated, the part not in writing may be proved by oral testimony insofar as it is not inconsistent with the written portion.[18] The Washington cases and the above Code provision both recognize that such additional terms cannot be added if the writing is fully integrated on the subject in question.

---

[18] In Sears, Roebuck & Co. v. Nicholas, 2 Wn.2d 128, 97 P.2d 633 (1939), the Washington Supreme Court quoted with approval the following language from other sources: "A well-settled exception to the parol evidence rule exists where the entire agreement has not been reduced to writing—that is, where there is what a learned writer on the law of evidence calls 'a partial integration'. In such a case parol evidence to prove the part not reduced to writing is admissible, although it is not admissible as to the part reduced to writing." Additional authorities on the same point are as follows: Buyken v. Ertner, 33 Wash. 2d 334, 205 P.2d 628 (1949); Von Herberg v. Von Herberg, 6 Wn.2d 100, 106 P.2d 737 (1940); Thomson & Stacy Co. v. Evans, Coleman & Evans, 100 Wash. 277, 170 Pac. 578 (1918); Wick v. DuBarry, 159 Wash. 380, 293 Pac. 447 (1930); Keeter v. John Griffith, Inc., 40 Wn.2d 128, 241 P.2d 213 (1952); Hazlett v. First Federal Sav. & Loan Ass'n, 14 Wn.2d 124, 127 P.2d 273 (1942).

The question of how to determine whether a particular subject has been "integrated" into the writing was discussed in the landmark case of Buyken v. Ertner, 33 Wn.2d 334, 205 P.2d 628 (1949), where the court quoted with approval from another source as follows:

> In searching for a general test for this inquiry, three propositions at least are capable of being generally laid down:
>
> (1) Whether a particular subject of negotiation is embodied by the writing *depends wholly upon the intent of the parties* thereto. . . .
>
> (2) This intent must be sought where always intent must be sought . . . , namely, in the *conduct and language* of the parties and the *surrounding circumstances.* . . .
>
> (3) In deciding upon this intent, the chief and most satisfactory index for the judge is found in the circumstance whether or not the *particular element of the alleged extrinsic negotiation is dealt with at all* in the writing.

The court in the Buyken case then went on to say that the above three tests were necessarily modified in this state by the rule that, "where a written agreement *purports* to cover the entire subject matter with respect to which the parties ar contracting, and fraud or mutual mistake is not claimed, evidence of a contemporaneous prior oral agreement contradicting or altering the terms of the writing is inadmissible." For

Section 2-203 Seals Inoperative.

The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

The Sales Act provides that contracts to sell or sales can be made in writing either with or without a seal.[1] The Act says nothing about the effect of a seal. However, this matter was the subject of early legislation in Washington (1888) in a statute which provided that: "The use of private seals upon . . . contracts . . . is hereby abolished, and the addition of a private seal to any such instrument or contract in writing . . . , shall not affect its validity or legality in any respect."[2] This statute and its contemporary successor[3] have abolished almost all effects of private seals in this state.[4] The one question still open is: Does a seal import consideration?

On its face the above act would certainly seem broad enough to preclude any argument that a seal still imports consideration. However, a few Washington cases have cast doubt on the matter. In *Considine v. Gallagher*,[5] decided in 1903, the court ruled that a complaint alleged sufficient consideration to get by a demurrer where the bond sued upon was set out in full and contained a seal. The court did not refer to the 1888 statute. In *Monro v. National Surety Co.*,[6] decided in 1907, the court held that a motion for nonsuit, which was based on the plaintiff's failure to prove consideration for a performance bond sued

additional authorities on the matter of how to determine whether a writing is integrated, see: Allen v. Farmers' & Merchants Bank, 76 Wash. 51, 135 Pac. 621 (1913); Alaska Pac. Salmon Co. v. Matthewson, 3 Wn.2d 560, 101 Pac.2d 606 (1940); Hazlett v. First Federal Sav. & Loan As'n, 14 Wn.2d 124, 127 P.2d 273 (1942); Interstate Engineering Co. v. Archer, 64 Wash. 629, 117 Pac. 470 (1911); Gaffney v. O'Leary, 155 Wash. 171, 283 Pac. 1091 (1929); Wick Co. v. DuBarry, 159 Wash. 380, 293 Pac. 447 (1930); Thomson & Stacy Co. v. Evans, Coleman & Evans, 100 Wash. 277, 170 Pac. 578 (1918).

[1] RCW 63.04.040.

[2] Terr. Laws 1888 p. 184, § 1.

[3] RCW 64.04.090. This 1923 statute amended the 1888 act by providing for the abolition of private seals on "deeds from a husband to his wife and from a wife to her husband for their respective community right, title interest or estate in all or any portion of their community real property." (Laws 1923 c. 23, § 1.) The 1888 statute had repealed an earlier act (Terr. Laws 1871 p. 83, §§ 1,2), which had required that deeds be sealed.

More recently, in 1957, a statute was passed making the absence of a corporate seal on contracts immaterial to their validity. Laws 1957 c. 200, § 1; RCW 64.04.105.

[4] For cases in support of the proposition that the statute has been effective in abolishing the use and effect of private seals in Washington (exclusive of the matter of a seal importing consideration), see Commercial Casualty Ins. Co. v. Tetz, 82 F.2d 683 (9th Cir. 1936), and McLeod v. Morrison and Eshelman, 66 Wash. 683, 120 Pac. 528 (1912).

[5] 31 Wash. 669, 78 Pac. 96 (1903).

[6] 47 Wash. 488, 92 Pac. 280 (1907).

upon, was improperly granted where the bond in question was shown to be sealed. The court considered the 1888 statute but said that it did not alter the common-law rule that a seal imported consideration. Although several more recent cases have discussed this question,[7] these two cases are the only ones that are directly in point on the matter. They have not been overruled. However, they raise issues that are essentially procedural, and, as interpreted by a later case,[8] they stand merely for the proposition that consideration is "presumptively" established by the seal; thus, if there is proof of lack of consideration the contract will fall. The deficiency will not be supplied merely by a seal.

Would these early Washington cases be followed today? Very likely not. In view of the rapidly disappearing usefulness of seals in present day transactions, and of the artificial and inequitable results that flow from their recognition by the law, there has, in the past seventy-five years, been a marked tendency toward their elimination.[9] The Washington statutes and cases are substantially in step with this trend. It would therefore seem at least unlikely that Washington would adhere to the rule in question. However, unless and until the supreme court, or the legislature, rules more clearly on the matter, the possibility of such a holding certainly cannot be ignored.

[7] In Golle v. State Bank, 52 Wash. 437, 100 Pac. 984 (1909), the court again said that a seal imports consideration. The statement, however, was quite unnecessary to the decision. Golle had been requested by the defendant bank to excute a deed to the bank to secure a preexisting debt of one Kemp, a friend of Golle. Golle executed the deed as requested and later brought this action to cancel the deed on the ground of fraud and lack of consideration. Regarding the fraud, he argued that he was only partially familiar with the English language (he was German) and had not understood the meaning of the deed. In reversing a judgment for the plaintiff (Golle), the supreme court said that Golle's understanding of English, and his business experience, were sufficient to negative the allegation of fraud or over-reaching. The court then added that the proof of the lack of consideration was not controlling, in view of the fact that the deed was sealed, and that a seal imports consideration. The court overlooked the fact that a deed needs no consideration to be valid and binding and that Golle would have been bound on the deed even without consideration. (See for example: Whalen v. Lanier, 29 Wn.2d 299, 186 P.2d 919 (1947); 26 C.J.S. Deeds § 16 [1956].) It was thus irrelevant to argue that a seal imports consideration. In McLeod v. Morrison and Eshelman, 66 Wash. 683, 120 Pac. 528 (1912), the court, per dictum, said, "while this court has held that a seal to an instrument which would have required a seal at common law still imports a consideration, as it did at common law [citing the Monro case] in most other respects the statute has abrogated the common law distinction between specialties and simple contracts." This statement was again unnecessary to the decision and thus justifies only passing consideration. Again, in Gates v. Herr, 102 Wash. 131, 172 Pac. 912 (1918), the court said by way of dictum that a seal imports consideration. The court ruled that a sealed simple contract did not establish conclusively that there was consideration; thus, the lower court was correct in admitting evidence of lack of consideration. In Hill v. Corbett, 33 Wn.2d 219, 204 P.2d 845 (1949), the court held that the particular instrument (a simple contract) was not sealed and that appellant's argument that a seal imports consideration was thus not relevant.

[8] Gates v. Herr, 102 Wash. 131, 172 Pac. 912 (1918).

[9] 1 WILLISTON, SALES § 50 (rev. ed. 1948); 47 Am. Jur. *Seals* § 13 (1943); 79 C.J.S. *Seals* § 2 (1952).

To assure that a corporate seal on an instrument has no greater effect than a private seal, the legislature in 1957 passed a statute (actually affirming prior case law[10]) providing that: "The absence of a corporate seal on any . . . contract or writing shall not affect its validity, legality, or character in any respect."[11] It is interesting to note that this statute has not caused any noticeable change in the practice of corporations of sealing their instruments.[12]

To the extent that the rule about seals importing consideration applies to sales and contracts to sell, the above section of the Code will change it; in fact, will abolish it. Washington will thus be in line with the majority of other jurisdictions and will be in accord with the continuing trend in the law to eliminate the effect of seals.

The Comment to the above section says that it "leaves untouched any aspects of a seal which relate merely to signatures or to authentication of execution and the like." Thus the Code would not affect the law in this state[13] on the question whether a seal on a corporate instrument makes it presumptively the act of the corporation.

The current question arising from the interrelationship of the statute setting up the requirements for corporate acknowledgements[14] and the statute abolishing the effect of seals in connection with contracts signed by corporations,[15] is not resolved by the above Code section.

(This article will be continued in subsequent issues.)

[10] See Bradley Distrib. Co. v. Seattle First Nat'l Bank, 34 Wn.2d 63, 208 P.2d 141 (1949).

[11] Laws 1957 c. 200, § 1; RCW 64.04.105.

[12] This was verified by checking with several of the Seattle-area lending institutions that handle quantities of corporate paper.

[13] See Bradley Distrib. Co. v. Seattle First Nat'l Bank, 34 Wn.2d 63, 208 P.2d 141 (1949).

[14] RCW 64.08.070.

[15] RCW 64.04.105. RCW 64.08.070 provides the statutory form for corporate acknowledgements and includes in the form a statement by the notary that "the seal affixed is the corporate seal of the corporation." This would seem to indicate that the corporate seal is essential to the validity of a corporate acknowledgment. In Bradley Distrib. Co. v. Seattle First Nat'l Bank, 34 Wn.2d 63, 208 P.2d 141 (1949), the court said that the omission of this element "does not render the acknowledgment defective." However, it is disturbing to note that RCW 64.04.105, which enacted that part of the Bradley rule saying that the absence of a corporate seal does not affect the validity, legality, or character of the instrument in any respect, does not expressly provide that a corporate acknowledgement is valid without the corporate seal.